BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT L. FRAZEE	)	
Claimant	)	
	)	
VS.	)	
	)	
GOLDEN WHEAT, INC.	)	
Respondent	)	Docket No. 201,840
	)	
AND	)	
	)	
ALLIED MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier and claimant appealed Administrative Law Judge Nelsonna P. Barnes' Award dated January 17, 2001. The Board heard oral argument on July 25, 2001, by teleconference.

APPEARANCES

Claimant appeared by his attorney, Orvel Mason. Respondent and its insurance carrier appeared by their attorney, Richard J. Liby.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge determined the cause for claimant's right hip arthroplasty and left hip arthrodesis was his work-related accident on February 15, 1994. The Administrative Law Judge further determined claimant sustained a work disability based upon the claimant's 50 percent task loss averaged with claimant's wage loss which varied annually from 1994 through 1999.

In its brief to the Board, the respondent raised the following issues for review: (1) whether the respondent is liable for the surgeries performed in 1996 and 1998; (2) nature and extent of claimant's disability; and, (3) whether the claimant is entitled to future medical benefits and/or review and modification.

The sole issue raised in claimant's application for review is whether the Administrative Law Judge correctly computed the permanent partial disability benefits. At oral argument before the Board, the claimant requested respondent's application for review be dismissed for failure to specify the issues to be considered.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and considering the briefs and the parties' oral arguments, the Board makes the following findings of fact and conclusions of law:

The Administrative Law Judge's Award sets out findings of fact and conclusions of law that are accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the findings and conclusions of the Administrative Law Judge as its own as if specifically set forth herein, except for the determination of the wage loss component of the work disability formula.

At oral argument before the Board, the claimant raised the additional issue that respondent's application for review should be dismissed because it did not specify the issues to be considered. K.A.R. 51-18-3 provides: "Applications for review should specify the issues to be considered. . . ." Specifying the issues to be addressed upon review by the Board assists in defining and focusing on the pertinent facts and law that a party considers significant to the determination of the appeal. However, the regulation does not specify what sanctions may be available, nor does it provide for dismissal of a request for Board review if the application for review fails to list the issues to be considered. Claimant does not cite any additional authority to support his argument. The Board notes that although Respondent's Application for Review did not, Respondent's Appeal Brief did specify the issues raised on review. Furthermore, even if it had not, with de novo review the Board can address those issues presented to the Administrative Law Judge or raised at oral argument. Claimant's request for dismissal of respondent's application for review is denied.

Whether the respondent is liable for the surgeries performed in 1996 and 1998.

Claimant was employed as a technician with respondent and his job duties included sales, repair and installation of commercial radios. Claimant would install a base station, an antenna, power supply and radio at business and residential locations. Claimant testified the job required a lot of work in awkward positions as well as climbing ladders and crawling in and out of trunks of vehicles or attics.

On February 15, 1994, claimant was installing a base radio at the Community Corrections Facility in Winfield, Kansas. Claimant had to throw his leg up over the edge of the eave to get up onto the roof while carrying supplies. He climbed the ladder up to the roof approximately 8 to 10 times on February 15, 1994. Claimant began to feel discomfort and pain in both of his hips. He continued to work and did not report the injury until the next day.

The claimant had difficulty getting out of bed the following morning and reported his injury to the general manager, Gerald Hoffman. Claimant was advised to do whatever needed to be done to get the problem taken care of. Claimant waited approximately a week and then made an appointment with his personal physician, Dr. Yoachim, but could not get in to see the doctor for two weeks.

On March 9, 1994, the claimant saw Dr. Yoachim with primary complaints of left hip and knee pain. A course of conservative treatment as well as diagnostic testing was conducted over a period of time. Dr. Yoachim referred the claimant to a neurologist, Dr. Vaidya in Ponca City, Oklahoma. Then Dr. Vaidya referred the claimant to Dr. Andrade for pain management. Dr. Yoachim additionally referred the claimant to Dr. Amrani and finally Dr. Yoachim referred claimant to Dr. Brossard on December 29, 1994. Dr. Brossard diagnosed avascular necrosis in both hips.

Claimant was referred to and first saw Dr. David A. McQueen on February 7, 1995. The doctor confirmed the diagnosis of bilateral avascular necrosis and treated the claimant conservatively with activity restrictions until July 24, 1996, when he performed a right total hip arthroplasty. After the surgery the claimant was treated with activity restrictions until July 9, 1998, when Dr. McQueen performed an arthrodesis (fusion) of the left hip.

The respondent ceased business operations in May 1994. When the respondent ceased doing business, the claimant began working full-time for a business of which he was a partner. Claimant performed the same type of work in radio communications that he had performed for respondent. Respondent argues that the need for the surgeries were the result of aggravations of claimant's condition after he began working for his own business.

Drs. McQueen and Mills testified claimant's work activities with respondent had permanently aggravated the underlying avascular necrosis condition. After his initial examination of the claimant, Dr. McQueen noted the only treatment option was total joint arthroplasty. It is significant to note the delay in surgery was at the suggestion of Dr. McQueen because he was aware of changes being made in the polyethylene used in the hip replacement hardware which would extend the life of the hardware. The medical evidence clearly establishes the surgeries were the result of the aggravations of claimant's underlying avascular necrosis which became symptomatic after the work-related incident on February 15, 1994.

In addition, claimant testified that during his treatment he complied as much as possible with his restrictions and reduced his physical activities. Claimant further testified he contracted with other people to perform the job activities that he could no longer perform.

Lastly, Dr. McQueen specifically noted claimant's self-employment activities were not accelerating the need for a total hip replacement. The Board concludes the surgeries were necessitated by the aggravation of claimant's underlying avascular necrosis condition which occurred during claimant's employment with respondent.

Nature and extent of claimant's disability.

The Administrative Law Judge adopted the opinion of the court ordered independent medical examiner, Dr. Philip Mills, that claimant had sustained a 40 percent permanent partial whole body functional impairment.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the AMA *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein. K.S.A. 44-510e. In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties. *Osborn v. Electric Corp. of Kansas City*, 23 Kan. App.2d 868, 936 P.2d 297 (1997). For injuries occurring before April 4, 1996, the Third Edition (Revised) of the AMA *Guides* is the version to be utilized. For injuries occurring on or after April 4, 1996, the Fourth Edition of the AMA *Guides* will be utilized. As claimant's injury occurred on February 15, 1994, the appropriate version in effect would be the Third Edition (Revised) of the AMA *Guides*. The Board agrees that Dr. Mills' opinion is the most persuasive because he alone referenced the Third Edition, (Revised) of the AMA *Guides*, which was the applicable version for this date of accident.

The Administrative Law Judge further concluded claimant had sustained a work disability. Utilizing a task list prepared by James Molski, a vocational rehabilitation consultant, Dr. Mills opined claimant could no longer perform 9 of the 20 tasks identified by Mr. Molski. However, there was one task the doctor was unsure about but he noted that if the task required overseeing crews in emergency situations at accident sites then the claimant could not perform that task. The claimant later testified and confirmed that was the nature of the activity required for that specific task. Accordingly, the Administrative Law Judge concluded claimant could no longer perform 10 of 20 tasks and had sustained a 50 percent task loss. As Dr. Mills was the only physician to express a task loss opinion, the Board agrees with this finding and affirms claimant's 50 percent task loss.

After the respondent ceased doing business, the claimant became self-employed as a partner in a business performing the same type of work in radio communications that he had performed for respondent. The Administrative Law Judge noted the wage loss component of the work disability formula could be determined by either adopting the opinion of Mr. Molski that claimant had the capability of earning between $5.15 to $6 an hour which would result in a wage loss between 65 and 70 percent or utilizing claimant's actual wage loss based upon his self-employment business income. The Administrative Law Judge concluded and the Board agrees the most accurate measure of claimant's wage loss is his partnership earnings from the business.

The claimant's accountant, Charles Tanner, testified regarding claimant's income after he ceased working for respondent and started his own business. Exhibit 3 from Mr. Tanner's deposition contains a table listing claimant's income from the business. The parties agree half of the self-employment tax should be deducted from his income. The Administrative Law Judge did not deduct this amount in calculating the wage loss percentages and her findings must be modified in that respect.

In addition, respondent argues the amounts claimant paid for health insurance should be included in the computation of claimant's annual income. However, the accountant testified claimant pays for his own health insurance and the partnership does not pay it. Lastly, the respondent contends a draw on the partnership capital should be included for the year 1999. However, the fact claimant is not entitled to any additional compensation payments for that year renders the issue moot.

Accordingly, and based upon the evidence provided by claimant's accountant, the Board concludes claimant sustained a 70 percent wage loss in 1994; a 50 percent wage loss in 1995; a 53 percent wage loss in 1996; a 35 percent wage loss in 1997; a 45 percent wage loss in 1998; and, a 39 percent wage loss in 1999.

The work disability is determined by averaging the task loss with the wage loss.[1] Accordingly, the 50 percent task loss must be averaged with the wage loss to determine the work disability for each time period the wage loss changed. The Administrative Law Judge's finding of the various percentages of work disability must be modified because the averages were incorrectly calculated. As previously noted, the 50 percent task loss remains constant but the wage loss varies annually. The claimant sustained a 60 percent work disability in 1994 (50 + 70 = 120 ÷ 2 = 60); a 50 percent work disability in 1995 (50 + 50 = 100 ÷ 2 = 50); a 51.5 percent work disability in 1996 (50 + 53 = 103 ÷ 2 = 51.5); a 42.5 percent work disability in 1997 (50 + 35 = 85 ÷ 2 = 42.5); a 47.5 percent work disability in 1998 (50 + 45 = 95 ÷ 2 = 47.5) and a 44.5 percent work disability in 1999 (50 + 39 = 89 ÷ 2 = 44.5).

Both parties raised the issue of whether the Administrative Law Judge erred in the calculation of benefits because of the annual variance of the wage loss component of the work disability. Respondent contends the calculation should be made based upon the final work disability percentage. Claimant argues the Administrative Law Judge incorrectly computed the weeks of benefits previously paid when recalculating for the annual change in the work disability percentage.

The respondent contends the application of prior Board decisions regarding the calculation of benefits when the disability changes limits the claimant to the last work disability established by the evidence. The Board disagrees with respondent's interpretation of its prior decisions on this issue.

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[1]K.S.A. 44-510e(a).

As demonstrated by this case, there can be periods of time when the claimant's disability percentage changes. The reform legislation enacted in 1993 changed the method used to calculate the weekly benefit payable but did not address how to calculate benefits payable for an injury when the disability rate changes for one injury.

Such a change may occur from review and modification or as a part of the initial award when, for example, the claimant ceases to work or returns to work after being off for a period. The award may change from functional to work disability or vice versa. The wage prong of the work disability test and consequently the percentage of work disability may change. Under the pre-1993 calculation, a change in the disability rate meant a change in the weekly rate for the remaining weeks. The calculation used for injury after July 1, 1993, does not lend itself so easily to a change.

There are several possible methods for calculating the award when there is a change in the disability rate. After considering the various options, the Board concluded the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those payments. If the rating goes down, as when the claimant returns to work after being off for a period of time, and the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, the new work disability rating is calculated based on 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid based on the lower rating is credited against amounts due. The last disability rating or amounts already paid or payable, if higher, become the ceiling on benefits awarded. This method of computation was affirmed by the Kansas Court of Appeals in *Wheeler v. Boeing Co*., 25 Kan. App. 2d 632, 967 P.2d 800 (1998), *rev. denied* 266 Kan. 1116 (1999), and further explained in *Deist v. Dillon Companies, Inc.*, WCAB Docket No. 213,485 (December 1999).

The respondent takes certain language in prior Board decisions out of context to conclude that only the last disability rating is controlling. During the time period encompassed by this decision the claimant's work disability changed on a yearly basis. Respondent's contention that only the last disability rating is controlling would ignore interim changes that might occur, such as demonstrated by this claim. Simply stated, after every change in the percentage of disability, a new calculation is required to determine if additional disability weeks are payable. If so, the claimant is entitled to payment of those additional disability weeks until fully paid or modified by a later change in the percentage of disability.

As previously noted, the Board's calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the

original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

Initially a payment rate must be determined, which in this case is calculated by multiplying the $695.21 average gross weekly wage by .6667.[2] Such calculation computes to an amount greater than the maximum provided by K.S.A. 44-510c and therefore results in the maximum payment rate of $313.

The next step is to determine the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was paid. The first 15 weeks of temporary total disability compensation is excluded. The remainder is multiplied by the percentage of permanent partial general disability.[3]

Herein, the parties stipulated that 44 weeks of temporary total disability compensation had been paid. Accordingly, 29 weeks (44 - 15 = 29) would be subtracted from 415 weeks and the remainder of 386 (415 - 29 = 386) would be multiplied by the 60 percent permanent partial general disability. Such calculation results in 231.60 weeks for which permanent partial disability compensation is payable.

The same calculation is made for each subsequent change in the work disability with the additional step of deducting the weeks of previously paid permanent partial disability from the total disability weeks payable as determined by each new calculation.

The Administrative Law Judge calculated the work disability in 1994 as commencing on May 15, 1994, when respondent ceased doing business. However, the parties stipulated claimant was paid 44 weeks of temporary total disability compensation but did not indicate the specific dates that such disability was paid. Because claimant cannot receive temporary total disability compensation and permanent partial disability compensation at the same time, for computation purposes, the temporary total disability will be computed starting from the date of accident.

On January 1, 1995, the work disability decreased to 50 percent. The new calculation would result in 193 disability weeks payable. From those weeks the prior 1.71 weeks of paid permanent partial disability would be deducted resulting in a total of 191.29 disability weeks payable.

On January 1, 1996, the work disability increased to 51.5 percent. The new calculation would result in 198.79 disability weeks payable. From those weeks the prior 53.85 weeks of paid permanent partial disability would be deducted resulting in a total of 144.94 disability weeks payable.

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[2]K.S.A. 44-510e(a)(1) (Furse 1993).

[3]K.S.A. 44-510e(a)(2) (Furse 1993).

On January 1, 1997, the work disability decreased to 42.5 percent. The new calculation would result in 164.05 disability weeks payable. From those weeks the prior 106.14 weeks of paid permanent partial disability would be deducted resulting in a total of 57.91 disability weeks payable.

On January 1, 1998, the work disability increased to 47.5 percent. The new calculation would result in 183.35 disability weeks payable. From those weeks the prior 158.28 weeks of paid permanent partial disability would be deducted resulting in a total of 25.07 disability weeks payable.

On January 1, 1999, the work disability decreased to 44.5 percent. The new calculation would result in 171.77 disability weeks payable. From those weeks the prior 183.35 weeks of paid permanent partial disability would be deducted resulting in no additional disability weeks payable.

Because claimant had already been compensated for more permanent partial disability weeks than that sum, the claimant is not entitled to additional compensation from that date forward unless the claimant's percentage of disability is again modified to provide additional weeks of disability compensation.

Claimant's entitlement to future medical benefits and review and modification.

Respondent also argues the Administrative Law Judge erred by awarding claimant future medical benefits "upon proper application to and approval by the Director," because claimant suffered an intervening injury or aggravation in his subsequent self-employment. Accordingly, respondent contends it should not be liable for any of claimant's future medical treatment. The Board finds the record does not prove an intervening injury. But, if there was or is in the future, respondent is protected from liability for any subsequent aggravation by the terms of the Administrative Law Judge's Award. Claimant must apply to the Director for approval of any future medical treatment. Before any treatment is authorized, claimant will be required to prove his need for such treatment was caused by and is directly attributable to his work-related injury with respondent. The same rationale applies to any future request for review and modification of the Award. The Board affirms the Administrative Law Judge's finding that claimant is entitled to future medical treatment upon proper application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna P. Barnes dated January 17, 2001, is modified as follows:

The claimant is entitled to 44 weeks temporary total disability at the rate of $313 per week or $13,772 followed by 1.71 weeks permanent partial compensation at $313 per week

or $535.23 for a 60 percent permanent partial general bodily work disability for the period from February 15, 1994, through December 31, 1994. For the period January 1, 1995, through December 31, 1995, claimant is entitled to 52.14 weeks of permanent partial disability compensation at the rate of $313 per week, or $16,319.82, for a 50 percent work disability. For the period January 1, 1996, through December 31, 1996, claimant is entitled to 52.29 weeks of permanent partial disability compensation at the rate of $313 per week, or $16,366.77, for a 51.5 percent work disability. For the period January 1, 1997, through December 31, 1997, claimant is entitled to 52.14 weeks of permanent partial disability compensation at the rate of $313 per week, or $16,319.82 for a 42.5 percent functional disability. For the period commencing January 1, 1998, claimant is entitled to 25.07 weeks of permanent partial disability compensation at the rate of $313 per week, or $7,846.91 for a 47.5 percent work disability, making a total award of $71,160.55.

The total compensation in the amount of $71,160.55, which is all due and owing, is ordered paid in one lump sum less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of December 2001.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Orvel Mason, Attorney for Claimant
Richard J. Liby, Attorney for Respondent
Nelsonna P. Barnes, Administrative Law Judge
Philip S. Harness, Workers Compensation Director